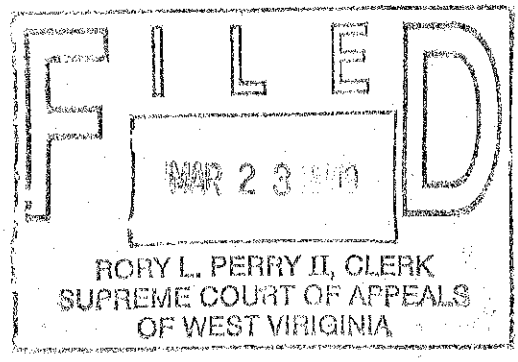
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston



JOHN R. MULLENS, DEFENDANT BELOW,
APPELLANT

v.

Appeal No. 34584

STATE OF WEST VIRGINIA, PLAINTIFF BELOW,
APPELLEE

REPLY BRIEF TO APPELLEE'S AMENDED BRIEF

ON BEHALF OF JOHN R. MULLENS, APPELLANT

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Comes now the Appellant, John R. Mullens (hereafter, Appellant) by counsel, John M. (Jack) Thompson, and replies as follows:

STATEMENT OF THE CASE

The appellee misconstrues appellant's position: Appellant firmly believes that the stoppage of his vehicle on September 29, 2007, in the Ames Heights area of Fayette County, West Virginia, was indiscriminate and, hence, non-compliant with established national and state case law. As such, the stop was in violation of his Fourth Amendment right as guaranteed by the Constitution of the United States and by Article III, Section 6 of the West Virginia State Constitution, and, consequently, such action constituted a seizure by the Fayette County Sheriff's Department, which acted with neither reasonable suspicion nor probable cause.

ISSUE PRESENTED

The Appellant further disagrees with the appellee's assessment of the issue presented: The true issue in this case is whether the circumstances surrounding the stop, as set forth in the AGREED FINDINGS OF FACT (Appellant's Brief, Exhibit #1), are consistent with recognized law in regard to the establishment of such "administrative" or "safety checkpoint" roadblocks for the purposes of verifying licensure, vehicle registration, and vehicle insurance.

STATEMENT OF FACT

Inasmuch as where the appellee's statement of fact is in harmony with the AGREED FINDINGS OF FACT, no exception is taken. There are, however, two allegations brought forth and stated as fact when, in actuality, there is no support for such assertions developed in the record. First, the appellee maintains that, "In response to a number of complaints received by [sic] the public concerning individuals that were operating motor vehicles on Ames Heights Road . . ." (Appellee's Brief, 3, 4). There absolutely is no reference, however, to "complaints received" from the general citizenry in the testimony of either deputy sheriff, as recorded during the Magistrate Court proceedings. In fact, quite to the contrary, Deputy Sheriff Patrick Jeb McCutcheon assumed full responsibility for the location site of the alleged "administrative" or "safety checkpoint" roadblock. The following courtroom exchange demonstrates this point conclusively:

> Q And had this area been reported to your all's office as being one of a high incident of people without insurance or without proper registration—
> A Yes, sir.
> Q -- or without inspection stickers?
> A Yes, sir.
> Q It had been reported to you?
> A **By me**. I actually pass that area quite often and make quite a few stops in that area of individuals who don't have these things. . . .

(T: McCutcheon, 13; emphasis added).

Deputy Sheriff Steven L. Yarber, Jr., although not present in the courtroom during Deputy McCutcheon's testimony, concurred in the following testimony:

> Q Deputy Yarber, there's been a little bit of conflict with regard to how you folks got over to Ames Heights. Can you tell me just exactly how you got involved in this road check?
> A . . . And this night [September 29, 2007] **Deputy McCutcheon**, I believe, was having problems in the Ames Heights area, people speeding through, it's a 25 mile an hour zone, and I know I've run radar and stuff over there and clocked drivers at 50-some miles an hour, it was just a problem area, so we decided to set up an administrative check, trying to slow drivers down,. . . .

(T: Yarber, 33, 34; emphasis added).

Second, the appellee claims the roadblock "was positioned in response to complaints about motorists operating vehicles without licenses and driving at excessive speeds" (Appellee's Brief, 6). It is, however, Deputy Yarber who introduced the concept of speeding, which he attributed to Deputy McCutcheon's concern. Speeding, of course, is an observable offense easily detected, and on any given day in West Virginia one may observe law enforcement agencies running radar screenings along the State's byways. Nowhere in the recorded testimony, however, did either deputy sheriff specifically cite motorists "without licenses" as a factor in determining the location site. Deputy McCutcheon did refer to "suspended driver's licenses" (T: McCutcheon, 15), but as argued previously by the Appellant, a suspended driver's license would not be immediately discernable without other violations present that would require checking the status of an individual's license (Appellant's Brief, 16).

These allegations are nothing more than conjecture: Neither deputy testified that the Fayette County Sheriff's Department was responding to any information other than the department's own. As there is no foundation for the two foregoing accusations found in the record as a whole, the Appellant respectfully requests that these allegations be treated as such and be stricken from the record.

CONCLUSIONS OF LAW

The Appellant takes exception categorically to appellee's conclusions of law, and further disagrees emphatically that the circumstances surrounding the events of September 29, 2007, resemble any of the conditions prescribed in either case setting precedence within the annuals of West Virginia case law, i.e., *State v. Frisby*, 161 W.Va. 734 (1978) and *State v. Davis*, 195 W.Va. 79 (1995).

The case on point, without question, is *Davis,* which relies both indisputably and profoundly upon *Frisby*, which—in turn—relies heavily upon *Delaware v. Prouse*, 440 U.S. 648 (1978). What the appellee's counsel does not disclose to this Court is that in the second aforementioned West Virginia case, the appellant Jane Davis approached a "roadblock consisting of two officers and ***two police vehicles with flashing lights.***"

Davis, 195 W.Va. at 81 [emphasis added]. This Court approved scenario is vastly different than two human figures standing in the approximate middle of a secondary roadway, each individual holding a battery-powered flashlight. *Davis*, furthermore, provides no evidence that officers conducted the roadblock intermittently, disbanding when dispatched by 911 to respond to emergency situations and then resuming later after whatever calamities had been managed (circumstances of the instant case so acknowledged in Appellee's Brief, 4).

Within the contextual discussion of *Davis*, the randomness of the events of September 29, 2007—the evening of question in the case now before this Honorable Court—is refuted first. According to testimony given by deputy sheriffs in Magistrate Court, the Fayette County Sheriff's Department had been conducting what may be better termed "regular" administrative or safety checkpoint roadblocks for some "five weeks" prior to September 29, 2007, as evidenced in the following testimony:

Q For how many weeks prior to this evening had you all been doing this?
A Depending on our – depending on our calls, probably the past five weeks, I guess, I mean, we were doing them –
Q Always on a Saturday night?
A Most of the time. Sometimes on Fridays.
Q Friday or Saturday night?
A Yeah, that's when we have the most deputies out, the rest of the week we only have one or two deputies out on the road.

(T: Yarber, 34, 35).

Albeit these roadblocks were conducted at various locations, a clear-cut pattern firmly is established in the referenced testimony; in furtherance of this argument, the testimony manifestly suggests that the Fayette County Sheriff's Department was targeting weekend drivers—mostly on Saturday, but "sometimes" Friday, evenings—during the height of the Gauley River Rafting Season. The official Gauley season has duration generally of eight weeks (or until the depletion of water resources from Summersville Reservoir), usually from the first week of September through the third week of October. Thus, for six-weekends of those eight weeks, the Fayette County Sheriff's Department was conducting these alleged "administrative" or "safety checkpoint" roadblocks, always on the weekend, always after 4 p.m. Interestingly enough, Deputy McCutcheon testified that he had not participated in any such roadblock during the nine weeks intervening

between the Appellant's arrest and the Magistrate Trial on November 28 and 29, 2007 (T: McCutcheon, 15). The Gauley River rafting season ended, the roadblocks ceased.

There is no evidence to suggest that any other detail of the Fayette County Sheriff's Department was conducting such checkpoints or roadblocks. Apparently, the sheriff's department was not concerned that any motorist driving on Sunday morning at 9 a.m. was properly licensed, with a registered vehicle appropriately insured and possessing no malfunctioning equipment. The Appellant submits to this Honorable Court that the appellee's counsel is unmistakably incorrect in the assertion that the stoppage of the Appellant's vehicle was "random" and thus in accordance with the language of *Davis*, *Frisby,* and *Prouse*. Rather, such stop occurred during the sixth weekend of a well-established, habitual practice, which had become regular business for the Fayette County Sheriff's Department during weekend patrol.

The Appellant takes issue, as well, with the appellee's claim that the alleged "administrative" or "safety checkpoint" roadblock was planned "hours" in advance of the stoppage of the Appellant's vehicle (Appellee's Brief, 6). In the following courtroom exchange, Deputy Yarber is seemingly vague or, at least, noncommittal, and perhaps even evasive, until pressed by the Appellant's Counsel:

Q Did you have a meeting with [shift] supervisor, Campbell, prior to initiating this checkpoint?
A I'm sure that we did.
Q You recall being there?
A I believe that I was there.
Q But you just believe. You don't specifically recall that evening meeting with Officer Campbell, getting his approval for this road check?
A Well, yeah, I remember, because we come in at 4:00, and he said that we were going to do this check over there at Ames Heights.

(T: Yarber, 34).

Moments later in the cross examination Deputy Yarber remained as equally hard to pin down about the evening's events:

Q What time did you actually arrive at the Ames Heights area, staging area?
A I don't recall exactly, sir.
Q Well, was it as soon as you broke up your meeting over at the courthouse at 4:00?

A It may have been, sir. We may have went and ate beforehand.

(T: Yarber, 35).

Deputy McCutcheon, during his direct examination, however, is fairly more certain that the alleged "administrative" or "safety checkpoint" roadblock began operation at "about" 5 p.m. (T: McCutcheon, 8). Deputy Yarber's contention that officers may have had dinner beforehand raises some question as to how long the meeting at the Fayetteville Field Office lasted, particularly in light of Deputy McCutcheon's belief that operations commenced somewhere around 5 o'clock. This sua sponte, impromptu meeting ***cannot*** and ***does not*** meet the burden of the "pre-conceived plan" as prescribed by the *Frisby* Court. A "pre-conceived plan" is not merely "stopping every vehicle" but that element rather is the methodology. The "pre-conceived plan" must include at least some, if not all, of the following:

- indication of the rationale for the location site;
- some indication of who actually is in charge of the operation;
- at least some sense of its duration;
- some aspect as to the number of officers required at minimum to conduct such operation; and
- some facet as to how any violators of law, if necessary, will be taken into custody without disbanding the operation.

The Fayette County Sheriff's Department memorandum outlining "Sobriety Checkpoint Policies & Procedures" (see Appellant's Brief, Exhibit #2) addresses each of these issues.

Of great consequence to the Appellant's position, too, is the *Frisby* Court's edict that all vehicles are to be stayed. The Court, indeed, spoke with clarity: ". . . stopping of ***every*** car at a checkpoint . . .," 161 W.Va. at 738 (emphasis added).

There is no equivocation or ambiguity in this directive, nor could there be in accordance[1] with the Fourth Amendment of the United State Constitution and with Article III, Section 6 of the West Virginia State Constitution. "Every" means, of course,

[1] Emulated here are both the opinion and the language of Chief Justice Benjamin in his concurring analysis of *David v. Commissioner of West Virginia Div. of Motor Vehicles*, 219 W.Va. 493, 637 S.E. 2d 591 (2006).

both "all" and "each." As the appellee's counsel consented to stipulate in the AGREEDED FINDING OF FACT, nonetheless, once the Appellant's vehicle was detained the deputy sheriffs at the scene permitted three vehicles to by-pass the alleged "administrative" or "safety checkpoint" roadblock (see Appellant's Brief, Exhibit #1, at #24). The *Frisby* Court provides no such latitude. The Court's language is extraordinarily clear: "every."

Further issue is taken with the "non-discriminatory" assertion (Appellee's Brief, 6). Non-discriminatory is an indication that all persons are treated equally within the framework of the pre-conceived plan. Inasmuch as the deputy sheriffs disbanded the operation to respond to emergency situations, thus only sporadically conducting the alleged "administrative" or "safety checkpoint" roadblock, the appellee's position is rendered meaningless. Only those motorists travelling through the Ames Heights area when officers were present and unoccupied were subjected to inspection of licensure, vehicle registration, and vehicle insurance. Nothing could be more discriminatory per se. This analysis, as well, is applied to appellee's assertion that the roadblock was "uniformly conducted" and "equally applied" (Appellee's Brief, 6, 7, respectively).

The appellee's counsel distorts the Appellant's inclusion of *Carte v. Cline*, 194 W.Va. 233 (1995). *Carte* is cited, first, as an example for its acknowledgement of rules and regulations governing sobriety checkpoints, and, second, within its internal citation contained in *State v. Legg*, 207 W.Va. 686 (2000). In the second instance, a choice was made to keep the excerpted intact. The Appellant disagrees with the appellee's contention that *Legg* is irrelevant to the case now before this Court. It is analogous on two fronts. First, the *Legg* Court acknowledges a need would exist for the Department of Natural Resources to have written procedures and guidelines that would pass muster in terms of constitutional scrutiny before stopping vehicles for game checking purposes. Second, in similar responses, a number of state courts have prescribed, mandated, or suggested specific guidelines for governing the structure and operation of "administrative" or "safety checkpoint" roadblocks. In addition to those cited in the Appellant's Brief (15), other jurisdictions have done the same. See for example, *LaFontaine v. State*, 269 Ga. 251, 497 S.E.2d 367 (1998), concluding that the decision to implement a roadblock must be made by supervisory personnel, not officers in the

field; *Commonwealth* [of Kentucky] *v. Buchanon*, 122 S.W.3d 565 (2003), suggesting (but not mandating) four criteria that trial courts may consider in determining the reasonableness of a particular roadblock: 1) decision made by supervisory personnel, not officers in field, 2) officers complying during roadblock with procedures established by their superior officers, 3) roadblock being readily apparent to approaching motorists, and 4) length of stop important in determining the intrusiveness; *Campbell v. Florida*, 679 So.2d 1168 (1996), holding that specific and detailed written guidelines are required before police agencies can establish a constitutionally valid roadblock; *Crandol v. City of Newport News*, 238 Va. 697, 386 S.E.2d 113 (1989), acknowledging that key factors in determining the legality of a checkpoint include proof of advance decisions by superior officers as to the time and location of the roadblock, adequate training of officers on the scene, and on-site supervision of the officers conducting the roadblock; *Lookingbill v. Oklahoma*, 157 P.3d 130 (2007), holding that police agencies operating checkpoints should have both written standards for conduct and policies to ensure compliance with those standards; and *Jones v. Florida,* 800 So. 2d 351 (Fla. App. Dist. 4) (2001), holding that the written guidelines proffered by the West Palm Beach Police Department were insufficient to uphold the constitutionality of a vehicle safety inspection stop.

In furtherance of the argument that *Legg* is germane to the case at hand, the Appellant points to the original language of *Prouse*: "This holding does not preclude the State of Delaware or other States from ***developing methods*** for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." 440 U.S. at 663 (emphasis added). In short, other jurisdictions have developed such methods by prescribing, mandating, or suggesting standards, guidelines, and procedures that govern both the operation and the conduct of law enforcement officers in the field while administering a legitimate "administrative" or "safety checkpoint" roadblock.

The Appellant takes no exception to appellee's referencing *Michigan Department of State Police v. Sitz,* 496 U.S. 444 (1990), as cited in *Carte v. Cline*, 194 W.Va. 233, but it is paramount to keep in mind that the *Carte* Court further observes that Michigan's sobriety checkpoint program was afforded constitutional protection by the United States Supreme Court ***only after*** the Michigan State Police had "appointed a sobriety

checkpoint advisory committee to create guidelines setting forth procedures governing checkpoint operations, site selection, and publicity." *Id.* at 237. This Michigan committee, important to remember as well, created not just a plan but ***the*** plan that later became widely adopted or imitated nationwide, including the current sobriety checkpoint policy of the Fayette County Sheriff's Department.

CONCLUSION

The Appellant avers that the events of September 29, 2007, in the Ames Heights area of Fayette County, West Virginia, amount to nothing more than a fishing expedition. Under the thinly-veiled guise of an alleged "administrative" or "safety checkpoint" roadblock, officers hastily initiated a Saturday evening roadblock, ignoring firm and established written policy in regard to sobriety checkpoints, and further exercised the unbridled power of police agencies to stop motorists with neither reasonable suspicion nor probable cause. Based upon all the foregoing matters, the Appellant asserts that his vehicle was stopped arbitrarily and capriciously, in disregard to established law, and further believes that the 12th Judicial Circuit erred in upholding the constitutionally of an indiscriminate roadblock, and the Appellant furthermore prays this Honorable Court will set aside the conviction.

Respectfully Submitted,

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By Counsel

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CERTIFICATE OF SERVICE

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN R. MULLENS, Defendant Below,
Appellant

v. **Appeal No. 34584**

STATE OF WEST VIRGINIA, Plaintiff Below
Appellee

I, John M. (Jack) Thompson, Counsel of Record for John R. Mullens, Appellant, do hereby certify that on this 20th day of March, 2009, I served a true copy of the foregoing ***REPLY BRIEF TO APPELLEE'S AMENDED BRIEF ON BEHALF OF JOHN R. MULLENS, APPELLANT,*** upon the following at their respective addresses and in the manner noted below, postage prepaid and mailed this 20th day of March, 2009.

Brian D. Parsons, Esquire — Via US Mail
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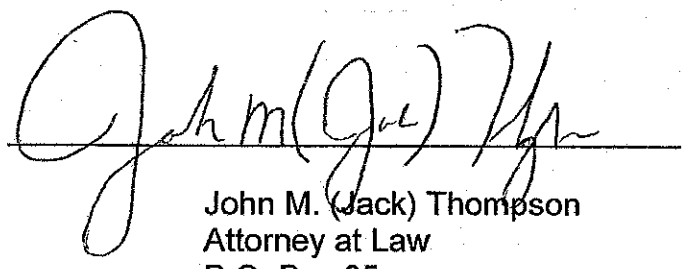

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